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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-1044

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY of the COMMONWEALTH OF MASSACHUSETTS,

Appellants,

vs.

ROBERT D. MURGIA,

Appellee.

On Appeal From the United States District Court for the District of Massachusetts.

Brief of Amici Curiae, the American Association of Retired Persons, the National Retired Teachers Association, and the National Senior Citizens Law Center.

JAMES A. LANIGAN, Esq.,
NATIONAL SENIOR CITIZENS LAW CENTER,
910 17th Street, N.W., Suite 216,
Washington, D.C. 20006,
(202) 872-1404,
Attorney for Amici Curiae.

NATIONAL SENIOR CITIZENS LAW CENTER,
1709 West 8th Street, Suite 600,
Los Angeles, Calif. 90017,
(213) 483-3990,
ROBERT B. GILLAN, Esq.,
Litigation Director,
PAUL S. NATHANSON, Esq.,
Executive Director,
Of Counsel.

(Names and addresses of attorneys continued on inside cover)

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IN THE

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Appellants,

vs.

ROBERT D. MURGIA,

Appellee.

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Brief of Amici Curiae, the American Association of Retired Persons, the National Retired Teachers Association, and the National Senior Citizens Law Center.

Interest of Amicus.

This brief amicus curiae is filed without motion, as permitted by Rule 42, the prior consent of the parties having been obtained. See Exhibit "A", attached hereto.

Your amicus National Senior Citizens Law Center is a Legal Services backup center which provides technical assistance to Legal Services attorneys throughout the United States with respect to legal problems affecting the low income elderly. Among the subjects of

study by said amicus is the subject of mandatory retirement which experience has demonstrated is a matter of vital concern to its client community.

Your amicus American Association of Retired Persons is a not-for-profit membership corporation of more than 7,500,000 persons over the age of 55. Your amicus National Retired Teachers Association is a not-for-profit membership corporation of over 450,000 retired teachers and school administrators. The latter two organizations are affiliated and jointly administered and their more than 8,000,000 members represent the largest organized group of older Americans in this country. Among the purposes of the American Association of Retired Persons are: to improve the quality of life for older people in this country; to understand aging and its ramifications; to offer older citizens opportunities to plan a way of life designed to attain maximum enrichment; and to help foster equality of opportunity for the aging population in this country. Among the purposes of the National Retired Teachers Association are: to promote the professional and economic status of retired teachers; to afford retired teachers an opportunity for the interchange of information and opinion on subjects of common interest; to aid retired teachers to receive available services and benefits; and to facilitate united action amongst those devoted to the welfare of retired teachers.

The American Association of Retired Persons and the National Retired Teachers Association believe that age-motivated retirement practices are wrong because they deprive our nation of the wisdom, experience and productivity of some of its most capable citizens and because they deprive affected individuals of a right

that should be limited only by ability, desire and need, and not by age, a factor which is neither an accurate nor appropriate criterion for distinguishing the abilities of workers.

Summary of Argument.

Work is one of the most important aspects of human existence and the freedom to work is an interest of constitutional dimensions. State or federal legislation which has the effect of depriving absolutely a person of gainful employment must be justified by a public interest. Laws requiring or resulting in retirement of workers physically or mentally unable to work are constitutionally permissible. Likewise, discharge, whatever the reason, is free of constitutional restraint provided its effect is not to positively divest an individual of meaningful employment opportunities.

The practical effect of involuntary retirement, for most people, is loss of the means for gainful employment; alternative job opportunities are, as a practical matter, non-existent. Because of the magnitude of the deprivation which involuntary retirement entails, where governmental action is present, the Fourteenth Amendment requires a strong countervailing public interest. In the absence of exceptional circumstances, workers who desire to remain employed past a given retirement age have a constitutional right to a meaningful hearing to disprove the factual assumptions underlying the proposed involuntary retirement. The record below demonstrates no governmental interest which would justify dispensing with such a hearing and, accordingly, the judgment should be affirmed.

I.

Freedom to Work Is an Important Constitutional Value.

Throughout the decades, freedom to work in the common occupations of life has been the subject of much constitutional litigation. The constitutional protections surrounding the freedom to pursue one's chosen occupation were articulated by this Court at least as early as the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1872), in which debate centered around the substantive contents, respectively, of the Privileges and Immunities Clauses of Article IV §2 and the Fourteenth Amendment to the Constitution. *Compare* the majority and dissenting opinions in *Butchers Benevolent Association of New Orleans v. Crescent City Livestock Landing and Slaughterhouse Co.*, 83 U.S. (16 Wall.) 36 (1872), and *Butchers Union Slaughterhouse and Livestock Landing Co. v. Crescent City Livestock Landing and Slaughterhouse Co.*, 111 U.S. 746 (1884); and *see Twining v. New Jersey*, 211 U.S. 78 (1908). Although this Court was divided as to the content of the Privileges and Immunities Clause of the Fourteenth Amendment, there was unanimity concerning the Privileges and Immunities Clause of Article IV §2. Both the majority and minority concurred in an early formulation by Associate Justice Washington in *Corfield v. Coryell*, 6 Fed. Cas. 546, 4 Wash. D.C. 371 (1823):

> ". . . [T]hose privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; . . . the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; . . . . The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise. . . ." 6 Fed. Cas. at 551, 552.

Mr. Justice Bradley, in his concurring opinion in *Butchers Union Slaughterhouse and Livestock Landing Co. v. Crescent City Livestock Landing and Slaughterhouse Co., supra,* was more specific concerning employment:

> ". . . The right to follow any of the common occupations of life is an inalienable right, it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'All men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and *the pursuit of happiness.*' This right is a large ingredient in the civil liberty of the citizen. . . ." 111 U.S. at 762.

Hence, according to the early teachings, by virtue of the Privileges and Immunities Clause of Article IV §2 of the Constitution, "the right to follow any of the common occupations of life" is "fundamental" and endowed with corresponding protections.[1]

---

[1]In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), this Court stated, in part:

> ". . . It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. . . ." 411 U.S. at 33.

The "fundamental" interest in interstate travel upon which *Shapiro v. Thompson*, 394 U.S. 618 (1969), was based is, at

(This footnote is continued on next page)

The *Slaughterhouse Cases* rested upon the Privileges and Immunities Clause of Article IV §2; later decisions by this Court utilized the Due Process Clause of the Fourteenth Amendment to protect the right to labor. In *Smith v. Texas,* 233 U.S. 630 (1914), this court invalidated a state criminal statute which made it unlawful for a person to serve as a train conductor without first having served two years as a brakeman. The decision was predicated upon the absence of a factual relationship between that requirement and the permissible objective of insuring competent conductors; therefore, the statute conflicted with the following principle:

> "Life, liberty, property, and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. Insofar as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling." 233 U.S. at 636.

---

least in part, grounded upon the Privileges and Immunities Clause of Article IV §2, *Shapiro v. Thompson, supra,* 394 U.S. at 630 n. 8; thus, it would seem, freedom to work could be considered equally "fundamental." *Corfield v. Coryell, supra,* 6 Fed. Cas. at 552.

Similarly, in *Truax v. Raich,* 239 U.S. 33 (1915), this court, in disapproving a state statute requiring private employers to discriminate against aliens, stated:

> ". . . But this admitted authority, [the police power] with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. *It requires no argument to show that the right to work for a living in the common occupations of the community is the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. . . .*" 239 U.S. at 41 (emphasis added).[2]

In *New State Ice Co. v. Liebmann,* 285 U.S. 262 (1932), which invalidated a statute conditioning the manufacture and distribution of ice upon a license and providing for the issuance of a license only if the geographical area in question was underserviced, this Court stated:

> "The opportunity to apply one's labor and skill in an ordinary occupation with the proper regard for all reasonable regulations is no less entitled to protection. . ." [than] ". . . the fundamental doctrine of freedom of the press. . . ." 285 U.S. at 280.[3] (quote transposed for clarity).

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[2]*Truax v. Raich, supra,* was cited, discussed, and quoted with approval in *In re Griffiths,* 413 U.S. 717 (1973), which invalidated a state law conditioning bar admission upon U.S. citizenship. *In re Griffiths* began with alienage as the major premise while *Truax* was premised upon "the right to work for a living in common occupations of the community."

[3]In *Colorado Spring Amusements, Ltd. v. Rizzo,* 387 F.Supp. 690 (E.D. Pa. 1974), the court, citing *Liebmann* and *Truax v.*

(This footnote is continued on next page)

In the period following World War II, when political affiliations and beliefs were sensitive topics, the sanctity of work as a constitutional value received additional attention. In *Wieman v. Updegraff*, 344 U.S. 183 (1952), it was held that a state is forbidden by the due process clause of the Fourteenth Amendment from conditioning public employment upon a loyalty oath which embraced innocent as well as subversive activities. In the language of this Court:

> ". . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory . . . ." 344 U.S. at 192.

To the same effect is *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956), which declared invalid a law automatically terminating the jobs of city employees who invoked the privilege against self-incrimination. Recognizing that the plaintiff did not have "a constitutional right to be an associate professor of German at Brooklyn College," 350 U.S. at 559, this Court nevertheless held that public employment could not be used as a lever for the sacrifice of other important constitutional rights.

The message of *Slochower* and *Wieman v. Updegraff, supra*, was refined in *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), which did not in-

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Raich, supra, declared invalid a Philadelphia ordinance prohibiting massage parlor employees from treating persons of the opposite sex. In the language of the court:

> "The right to engage in a lawful business or profession without arbitrary restraints is a 'fundamental right' within the protection of the Fourteenth Amendment. . . ." 387 F. Supp. at 696.

volve a public employee but, rather, an applicant for admission to the Bar who was unsuccessful because of earlier socialistic affiliations. Finding a lack of any correlation between the plaintiff's past political activities and his present moral character and capacity to practice law, this court held the State had deprived him of due process:

> "A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection clause of the Fourteenth Amendment. . . . A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the Bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. . . ." 353 U.S. at 238, 239.

In the more recent decisions bearing upon employment as a constitutionally protected right, procedural due process has been the focus. In *Bell v. Burson*, 402 U.S. 535 (1971), which invalidated a state's financial responsibility law not affording an appropriate hearing prior to suspension of the license of an uninsured motorist, this Court stated:

> ". . . Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. . . ." 402 U.S. at 539.

In *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), which disapproved pre-judgment wage garnishments, this Court, though not concerned with employment as such, was concerned with the fruits of labor; and emphasized that: ". . . [g]arnishment often meant the loss of a job." 395 U.S. at 340. *Goldberg v. Kelly*, 397 U.S. 254 (1970), it is submitted, is also relevant because the interest deemed surrounded by procedural due process guarantees, though not the fruits of labor, was the equivalent for the disadvantaged.

In *Board of Regents v. Roth*, 408 U.S. 564 (1972), it was held that a non-tenured teacher had no constitutional right to a hearing prior to a decision which failed to renew his one-year contract; however, the importance of the right "to engage in any of the common occupations of life" was reiterated:

> ". . . [W]hile the court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words 'liberty' and 'property' in the Due Process Clause of the Fourteeth Amendment must be given some meaning.
>
> 'While this court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.' . . . In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed. . . .
>
> *There might be cases in which a state refused to re-employ a person under such circumstances that interests in liberty would be implicated.* . . ."[4] 408 U.S. at 572, 573 (emphasis added).

Later, in *Arnett v. Kennedy*, 416 U.S. 134 (1974), a majority of the members of this Court, on the strength of *Roth* and *Perry v. Sinderman*, 408 U.S. 593 (1972), found that a non-probationary federal employee had a statutory entitlement to continued employment which could be terminated only for cause, following an appropriate hearing.

Hence, governmental interference with the freedom to work has, from the beginning, implicated the Federal Constitution. Public employment has apparently been given special treatment because of the inevitable "state action" when the public servant is affected by laws or policies regulating his employment. However, as *Truax v. Raich, supra,* and *Smith v. Texas, supra,* demonstrate, governmental intrusion into *private* employment is also subject to constitutional limitations. *See also Schware v. Board of Bar Examiners, supra.*

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[4]The above quote borrowed heavily from *Meyer v. Nebraska*, 262 U.S. 390 (1923), and in that opinion Mr. Justice McReynolds borrowed from the *Slaughterhouse Cases* discussed earlier. While a broad generalization would be unwarranted, it does seem safe to observe that, historically, the Privileges and Immunities Clause of Article IV §2 of the Constitution gave some content to the concept of "substantive due process" and that the latter was instrumental in formulating the interests guaranteed by "procedural due process."

II.

The General Rule That the Employer-Employee Contract Is Terminable at the Will of Either Party Absent Legislative or Other Permissible Legal Restrictions to the Contrary, Does Not Authorize Unreasonable Governmental Interference With Freedom or Liberty to Work.

It is beyond question that, with well recognized exceptions, such as a collective bargaining agreement or civil rights legislation,[5] the employer-employee contract is terminable at the will of either party. *Buian v. J. L. Jacobs and Co.,* 428 F.2d 531 (7th Cir. 1970); *Pearson v. Youngstown Sheet and Tube Co.,* 332 F.2d 439 (7th Cir. 1964); *Meadows v. Radio Industries,* 222 F.2d 347 (7th Cir. 1955). As Mr. Justice

[5]See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, and the Federal Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, *et seq.* As will be developed below, the thrust of your amici's argument is based upon the procedural due process strictures of the Fourteenth Amendment rather than the equal protection clause; it will also be posited that the two provisions are, within the context of the present case, so interrelated that disposition on procedural due process grounds removes any equal protection problem. It does seem appropriate, however, to note that in *Frontiero v. Richardson,* 411 U.S. 677 (1973), this Court observed that in Title VII of the Civil Rights Act of 1964 Congress "manifested an increasing sensitivity to sex-based classifications" and that "this conclusion of a co-equal branch of Government is not without significance to the question presently under consideration. . . ." 411 U.S. at 687, 688. Through the Age Discrimination in Employment Act of 1967 Congress, with respect to employment, manifested increasing sensitivity to age-based classifications. The protections of the Age Discrimination in Employment Act are limited to individuals less than 65 years of age, 29 U.S.C. §631, although some members of Congress are in favor of removing that limitation. See S. 871, 94th Cong., 1st Sess., introduced February 27, 1975 by Senator Fong, co-sponsored by Senators Brock, Church, Domenici, Fanin, Hansen, Randolph, Stafford and Williams, *Cong. Rec.,* Feb. 27, 1975, 2749-2751. It should also be noted that effective May 1, 1974 the Act was amended to embrace state employees within its protections, Sec. 28, P.L. 93-259, 88 Stat. 74, 29 U.S.C. §630(b); the amendment came too late to help the appellee, whose retirement occurred in 1972.

Powell observed in a statement arguably representing the view of a majority of the members of this Court in *Arnett v. Kennedy, supra:*

> "No property interest would be conferred, for example, where the applicable statutory or contractual terms, either expressly or by implication, did not provide for continued employment absent 'cause'." 416 U.S. at 167 n. 2.

Thus the interest in government employment enunciated in *Arnett* does not flow directly from the Constitution but, rather, from the language of the statute creating the "entitlement." As a general proposition, there would be nothing wrong with a statute limiting public employment to one year, two years, or five years with respect to any particular job, just as there is nothing wrong with a contract of employment limited to a specified duration.

However, it is equally true, as the cases discussed earlier demonstrate, that governmental intrusion into an individual's freedom to earn a living may not be so unreasonable as to substantially curtail that freedom with no corresponding justification. To deprive a physician of his license to practice medicine, for example, would not be permitted by the due process clause unless justified by a legitimate state interest; a state may disqualify an illegal abortionist from the practice of medicine, but the factual basis for such action must be established at a fair hearing. *Withrow v. Larkin,* 421 U.S. ...., 95 S.Ct. 1456 (1975). Likewise, an individual who advocates the forceful overthrow of his government may be disqualified from practicing law; however, the factual justification must first be established in accordance with the safeguards of procedural

due process. *Schware v. Board of Bar Examiners, supra,* 353 U.S. 232 (1957); *Willner v. Committee on Character,* 373 U.S. 96 (1963). Again, it is believed that had the State of Oklahoma in *Wieman v. Updegraff, supra,* 344 U.S. 183 (1952), replaced the loyalty oath with a factual investigation into the teacher's true subversive ideas, no constitutional problem would have existed.[6] Accordingly, the general proposition that an employer/employee contract can be terminated at will by either party is subject to an important qualification; the government, either in its capacity as employer or otherwise, may not significantly curtail the freedom of an individual to earn a livelihood without first affording an appropriate hearing to determine if the facts upon which the curtailment is based exist.[7]

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[6]The decisions dealing with procedural due process rights surrounding employment, whether public or private, are to be distinguished from cases where employment, or its equivalent, is used as an instrument to chill the exercise of First Amendment rights. *See Pickering v. Board of Education,* 391 U.S. 563 (1968); *Kevischian v. Board of Regents,* 385 U.S. .... (1967); *Sherbert v. Verner,* 374 U.S. 398 (1963).

[7]That conclusion is buttressed by several decisions which consider the availability of other employment opportunities significant in assessing the need for a hearing. *Cafeteria Workers v. McElroy,* 367 U.S. 886 (1961), sustained the summary revocation by a military commander of a short order cook's pass to enter the naval gun factory to work; reliance was placed on the fact that "[t]here is nothing to indicate that this determination would in any way impair [the plaintiff's] employment opportunities anywhere else." 367 U.S. at 898, 899. *See also Wieman v. Updegraff, supra,* 344 U.S. 183 (1952); *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123 (1951). In *Board of Regents v. Roth,* 408 U.S. 564 (1972), this Court observed that:

> ". . . [T]here is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case. . . ." 408 U.S. at 573.

III.

Involuntary Retirement of an Employee Is a Substantial Deprivation When Based Upon Age Because of the Attendant Physical, Emotional, and Economic Consequences.

Obviously, an individual must work to eat and thus freedom to work is the cornerstone of life itself. It requires no argument, therefore, to prove the magnitude of the deprivation when an individual is retired against his will under circumstances leaving him few or no alternate employment opportunities; and that is the undeniable consequence of involuntary retirement.[8] From an economic viewpoint, the situation is ameliorated somewhat by the existence of public and private retirement plans and government programs such as Titles II and XVI of the Social Security Act; 42 U.S.C. §401, *et seq.;* 42 U.S.C. §1381, *et seq.* However, it is submitted, this Court can take judicial notice of the

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See Sims v. Fox, 505 F.2d 857 (5th Cir. 1974); *Adams v. Walker,* 492 F.2d 1003 (7th Cir. 1974); *Calvin v. Rupp,* 471 F.2d 1346 (8th Cir. 1973); *Lipp v. Board of Education,* 470 F.2d 802 (7th Cir. 1972).

[8]In its preamble to the Age Discrimination in Employment Act of 1967, Congress found:

> "(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave; . . ." 29 U.S.C. §621(a).

fact that, for the average worker, such devices replace only a fraction of the income loss entailed by loss of employment. *See* Amicus Brief of the American Civil Liberties Union, *et al.*, on file herein.

Less obvious is the physical and emotional damage to an individual caused by deprivation of meaningful opportunities to work. In the language of the American Medical Association Committee on Aging:

> "Compulsory retirement on the basis of age will impair the health of many individuals whose job represents a major source of status, creative satisfaction, social relationships or self-respect. It will be equally disastrous for the individual who works only because he has to and who has a minimum of meaningful goals or interests in life, job related or otherwise. Job separation may well deprive such a person of his only source of identification, and leave him floundering in a motivational vacuum with no frame of reference whatsoever.

There is ample clinical evidence that physical and emotional problems can be precipitated or exacerbated by denial of employment opportunities. Few physicians deny that a direct relationship exists between enforced idleness and poor health. The practitioner with a patient load comprised largely of older persons is convinced that the physical and emotional ailments of many of these patients are a result of inactivity imposed by denial of work. Physicians generally agree that chronic complaints develop more frequently when a person is inactive and without basic interests. It is easy for

> the unemployed, unoccupied person to over-concern himself with his own normal physiological functions, and to exaggerate minor physical or emotional symptoms."[9]

Consequently, it can hardly be gainsaid that the magnitude of the deprivation attendant upon involuntary retirement is great. When involuntary retirement is the result of governmental action certainly, as a general principle, an individual faced with such a drastic measure must, under the Fourteenth Amendment, be given an appropriate hearing to determine if it is justified in fact. Perhaps exceptions exist[10] but, as will be developed below, no such exception exists with respect to the appellee.

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[9]*See Retirement, A Medical Philosophy and Approach,* AMA Committee on Aging, pages 2, 3, attached hereto marked Exhibit "B". Your amicus respectfully asks the Court to take judicial notice of the facts contained therein. Judicial notice has been frequently taken of undeniable human characteristics. *Ber v. Celebrezze,* 332 F.2d 293 (2d Cir. 1964); *Lykes Bros. SS Co. v. Boudoin,* 211 F.2d 618 (5th Cir. 1954); *rev'd on other grounds* 348 U.S. 336 (1955); *Atlantic Coast Line R. Co. v. Coleman,* 182 F.2d 712 (5th Cir. 1950); *Carter v. Campbell,* 179 F.Supp. 359 (N.D. Tex. 1959); *Cronenberg v. United States,* 123 F. Supp. 693 (E.D. N.C. 1954).

[10]The relationship between advancing age and productivity in general, as well as with respect to specific tasks or jobs, is a study which is in its infancy and the evidence is, by any objective standard, fragmentary. *See Hodgson v. Greyhound Lines, Inc.,* 354 F.Supp. 230 (N.D. Ill. 1973), *rev'd* 499 F.2d 859 (7th Cir. 1974); *Spurlock v. United Airlines, Inc.,* 475 F.2d 216 (10th Cir. 1972); *Airline Pilots Association, International v. Quesada,* 276 F.2d 892 (2d Cir. 1960). With respect to certain occupations, at least until further scientific data is available, individualized determinations of skill and ability may not be feasible. However, it is submitted, a strong showing would be required before the usual requirements of procedural due process could properly be dispensed with.

IV.

The Decision of the Lower Court Was Correct Because the Proof Demonstrated the Absence of Any Valid Basis for Dispensing With a Hearing at Which the Appellee Would Have an Opportunity, Consistent With the Constitution, to Show His Ability to Continue Satisfactorily Performing the Duties of a Uniformed Police Officer.

Interwoven in the lower court's decision are both procedural due process and equal protection concepts. In fact, and with respect to the present issue, the two are inseparable. If employment *per se* were not clothed with procedural due process safeguards, the question remaining would be whether the age-based classification resulting from the mandatory retirement law were rational, *see Reed v. Reed,* 404 U.S. 71 (1971); suspect, *see Frontiero v. Richardson,* 411 U.S. 677 (1973); or subject to strict scrutiny, *see Shapiro v. Thompson,* 394 U.S. 618 (1969). Although the lower court used language relevant to the Equal Protection Clause, it is submitted that it actually found the non-existence of such an issue when it held that "plaintiff has at least a recognizable interest in retaining his employment which the state cannot deny arbitrarily and irrationally;" and that, under the circumstances, an appropriate hearing was required.[11]

[11]Two lower federal courts failed to perceive the procedural due process question presented by mandatory retirement laws or policies and also found that the equal protection clause of the Fourteenth Amendment was not implicated. *Weiss v. Walsh,* 324 F.Supp. 75 (S.D. N.Y. 1971), *aff'd,* 461 F.2d 846 (2d Cir. 1971), *cert. den.* 409 U.S. 1129 (1973); *Armstrong v. Howell,* 371 F.Supp. 48 (D. Neb. 1974); *cf. Retail Clerks Union, Local 770 v. Retail Clerks International Association,* 359 F.Supp. 1285 (C.D. Cal. 1973); *Cookson v. Lewistown School District,* 351 F.Supp. 983 (D. Mont. 1972). One decision which upheld the mandatory retirement of state policemen at the age of 60 did not even consider the existence of federal constitutional issues. *McIlvanie v. Pennsylvania State Police,* 296 A.2d 630 (Pa. 1972), *dismissed for want of substantial federal question,* 415 U.S. 986 (1974), and one court dismissed a suit challenging the constitutional validity of the 70-year-old mandatory retirement law affecting federal civil servants for lack of a substantial federal question, without considering the merits. *Weisbrod v. Lynn,* 383 F.Supp. 933 (D. D.C. 1974), *aff'd without opinion,* 421 U.S. 940 (1975).

Thus, as a procedural due process issue, mandatory retirement has received little or no judicial attention.

In *Weinberger v. Salfi,* 422 U.S. ...., 43 L.W. 4985 (June 25, 1975), this Court pointed out the distinction between laws affecting "liberties protected by the due process clause of the fourteenth amendment" ("basic civil rights of man"), 43 L.W. at 4991, 4992, and laws containing mere classifications affecting the receipt or denial of non-contractual government benefits. In the case of the former, because of the magnitude of the deprivation potentially involved, procedural due process requires that the factual basis for the deprivation be fairly established. *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974); *Stanley v. Illinois,* 405 U.S. 645 (1972). With respect to the latter, the government is free to classify as it wishes provided, of course, no chilling effect is imposed upon the exercise of other express or implicit constitutional rights. *E.g., Shapiro v. Thompson, supra; Sherbert v. Verner,* 374 U.S. 398 (1963).[12] For reasons stated earlier, "the freedom to earn a living in the common occupations of life" is a liberty protected by the due process clause of the Fourteenth Amendment and is therefore immune

[12]In addition, under certain circumstances a classification will be disfavored when, along with lacking any rationality, it singles out and, in effect, punishes unpopular classes of people such as illegitimates or "hippies." *Jimenez v. Weinberger,* 417 U.S. 628 (1974); *United States Dept. of Agriculture v. Moreno,* 413 U.S. 528 (1973).

from classifications representing legislative or executive judgments concerning the age at which that freedom can be taken away.[13] The magnitude of the deprivation requires that a factual basis for the action be fairly established.

The question remaining is whether, under the facts of the instant case, any justification exists for depriving the appellee of an opportunity to demonstrate, factually, his ability to continue serving as a uniformed policeman. In the language of the lower court:

> "Individual testing is not impracticable but, rather, is already the order of the day. There is no suggestion that it is more burdensome to examine an officer at age 50 than it was at age 49. We must look, therefore, in another direction for reasonableness—is there, for example, a greater risk at the higher age that the test, or more exactly, the prognosis based upon testing, will be less reliable? . . .
>
> So far as appears, no study has been conducted of any kind. While there has been a compilation of certain statistics, from defendants' standpoint they are counter-productive. Not only did no expert testify to any significance in age 50 in a group which, by hypothesis, had individually passed annual tests during the preceding decade, but statistics of actual experience forecast no immi-

[13]Of course, age based classifications are both necessary and appropriate in settings where less important interests are involved, such as voting, jury eligibility, service in the armed forces and classifications for tax exemptions. *Oregon v. Mitchell*, 400 U.S. 112 (1970); *United States v. Duncan*, 456 F.2d 1401 (9th Cir. 1972), *vacated on other grounds*, 409 U.S. 814; *Smith v. United States*, 424 F.2d 267 (9th Cir. 1970); *Scarangella v. Commissioner*, 418 F.2d 228 (3rd Cir. 1969).

> nent change. The statistics furnish no reason to suppose that age 50 is within, or even significantly approaching a range where changes of conditions warrant a change of treatment. Rather, they contradict it."

Because of these findings, it is submitted, there is no permissible basis for denying appellee a hearing, consistent with due process, to determine his ability to continue to perform the duties of a policeman.

Conclusion.

The basic contention of your amici is that the freedom to work is a "liberty" within the procedural due process guarantees of the Fourteenth Amendment. All constitutional guarantees, including the right to work for a living, are necessarily qualified by the police power of a state. Because of the fundamental nature of the interest involved, however, any substantial restriction must be justified by a demonstrable governmental interest.[14] The factual relationship between advancing age and delining productivity is a study in its infancy and much more needs to be learned; it is undeniably

[14]Implicit in all that has been said above is the fact that there is a distinction between *involuntary* retirement and voluntary retirement pursuant to a pension or profit sharing plan, voluntary retirement for reasons of health, and voluntary retirement because one is tired of working and desires to relax and receive his Social Security benefits. The number of people who do not wish to retire at a particular age singled out by a mandatory retirement statute or policy has been the subject of study and figures are available. *See Amicus Brief of A.C.L.U., et al.* Your amicus does not contend that all employees must prove they are unable to work before they are permitted to retire. On the contrary, the constitutional issue is relevant only to those workers who can and wish to work beyond an age specified in a pension or retirement plan, or a law, and to forego any retirement benefits until cessation of work is either desired or necessitated by advancing age or declining physical or mental health.

true that the relationship between chronological age and functional age varies from individual to individual. It may well be that, with respect to certain occupations and professions, accurate tests of productivity or ability are not feasible and some other judgmental standard must be substituted. Nevertheless, for most tasks, accurate and reliable means for individualized evaluations either exist or will surely be developed in the future. Therefore, the constitutional implications of mandatory retirement are, at this point, difficult to precisely define. It is submitted, however, that under the facts of the instant case the judgment of the lower court was correct and should be affirmed.

Dated: Washington, D.C., August 27, 1975.

Respectfully submitted,

JAMES A. LANIGAN, Esq.,
NATIONAL SENIOR CITIZENS LAW CENTER,
Attorney for Amici Curiae.

NATIONAL SENIOR CITIZENS LAW CENTER,
ROBERT B. GILLAN, Esq.,
Litigation Director,
PAUL S. NATHANSON, Esq.,
Executive Director,
Of Counsel.

MILLER, SINGER, MICHAELSON, BRICKFIELD & RAIVES,
Attorneys for the American Association of Retired Persons and the National Retired Teachers Association.

ALFRED MILLER, Esq.,
STEPHEN L. SOLOMON, Esq.,
Of Counsel.

EXHIBIT A.

CONSENT FOR FILING A BRIEF AMICUS CURIAE ON BEHALF OF THE APPELLEE ROBERT D. MURGIA PURSUANT TO SUPREME COURT RULE 42

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 74-1044

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary for the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY OF THE COMMONWEALTH OF MASSACHUSETTS,

Appellants

V.

ROBERT D. MURGIA,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

The undersigned parties in the pending case *Massachusetts Board of Retirement v. Murgia,* No. 74-1044 hereby assent to the filing of a brief *amicus curiae*

on behalf of the Appellee, Robert D. Murgia, by National Senior Citizens Law Center, Robert B. Gillan, Director [of Litigation.]

/s/ Terence P. O'Malley
Terence P. O'Malley, Esq.
Assistant Attorney General
Commonwealth of Massachusetts
For the Appellants

/s/ Robert D. City
Robert D. City, Esq.
MOULTON, LOONEY & MAZZONE
15 Broad Street
Boston, Massachusetts 02109
For the Appellee

Dated: July 18, 1975

Consent for Filing a Brief Amicus Curiae on Behalf of the Appellee Robert D. Murgia Pursuant to Supreme Court Rule 42.

In the Supreme Court of the United States. October Term, 1974.

Commonwealth of Massachusetts Board of Retirement; Robert Q. Crane, Angelo Amato and J. Joseph Maloney, Jr., as They are Members of the Commonwealth of Massachusetts Board of Retirement; James W. Callanan, Executive Secretary of the Commonwealth of Massachusetts Board of Retirement; and John F. Kehoe, Jr., Commissioner of Public Safety of the Commonwealth of Massachusetts, Appellants v. Robert D. Murgia, Appellee. No. 74-1044.

On Appeal from the United States District Court for the District of Massachusetts.

The undersigned parties in the pending case *Massachusetts Board of Retirement v. Murgia* No. 74-1044 hereby assent to the filing of a brief amicus curiae on behalf of the Appellee, Robert D. Murgia, by the American Association of Retired Persons and the National Retired Teachers Association, by Stephen Solomon, Esq., Miller, Singer, Michaelson, Brickfield and Raives.

/s/ Terence P. O'Malley
Terence P. O'Malley
Assistant Attorney General
Commonwealth of Massachusetts
For the Appellants

/s/ Robert D. City
Robert D. City
Moulton, Looney & Mazzone
15 Broad Street
Boston. Massachusetts 02109
For the Appellee

Dated: August 11, 1975

EXHIBIT B.

Retirement—A Medical Philosophy & Approach.

FOREWORD

The AMA Committee on Aging is convinced that a sense of purpose and the opportunity to contribute to the well being of others are as vital to an individual's health as are adequate medical care, nutrition or rest. For this reason, the Committee is deeply concerned with policies which call for arbitrary retirement based on chronological age, without regard to individual desires and capabilities.

This paper summarizes the Committee's convictions as to the negative health effects of such compulsory job separation. It also suggests a medical system for determining physical and mental fitness for continued employment; a system which can be applied periodically over the employee's entire work life.

This paper does not attempt to discuss the social and economic factors which also bear on the question of retirement; it represents simply the medical philosophy of the Committee toward conservation and utilization of our most precious resource—human beings.

/s/ Frederick C. Swartz, M.D.
Frederick C. Swartz, M.D.
Chairman, Committee on Aging

A. Medical Viewpoint

The increase in life expectancy and higher health levels will prove of little benefit to man if he is denied the opportunity to continue contributing of his skills at a certain chronological age, whether this be 45, 65 or 85 years.

It is the conviction of the American Medical Association Committee on Aging that such arbitrary retirement and denial of work opportunity—whether the work is for pay or the pleasure of giving—seriously threatens the health of the individual concerned. By way of emphasis, when we speak of "retirement" in this paper, we mean the complete separation of the man from his job.

Medicine, "the oldest of the professions in the sense that it comprises a group of men who not only share a common training in the relevant sciences and arts, but who also have adopted a code of practice and obligated themselves to perform a service to their fellow men," sees in retirement a direct threat to the health and life expectancy of the persons affected.

Medicine, more than any other discipline, is that knowledge which exists totally for the service of mankind. In the rendering of this service, the basic philosophy has always been to do good, and to do no harm. No matter where we start in the cycle of a generation, the aim of medicine has been to prolong living, to reduce and eliminate suffering, and—above all—to save lives.

The gnarled, runty, deformed child, the acutely and chronically ill, and the handicapped disabled oldster are the highest objects of medical attention, for within these warped receptacles resides that spark of infinity termed life.

The well and healthy are the concern of medicine for the same reason, for there is still much to be done before the race can be perfected. Every effort is made to assist each individual to achieve his maximum potential, to utilize his abilities for his own and the human community's greatest benefit.

From the beginning of life until its end, these objectives and motivations should continue to apply. Unfortunately, they apply only until a certain chronological age—most often 65—when forces outside of medicine inflict a disease—or disability-producing condition upon working men and women that is no less devastating than cancer, tuberculosis, or heart disease. This condition—enforced idleness—robs those affected of the will to live full, well-rounded lives, deprives them of opportunities for compelling physical and mental activity, and encourages atrophy and decay. It robs the worker of his initiative and independence. It narrows physical and mental horizons so much that the patient's final interests and compulsions are in grumbling about his complaints.

This condition has brainwashed thousands into the belief that at 65 one is over the hill. It has imposed the philosophy of the marketplace on the employee—a philosophy that substitutes, at an arbitrary chronological age, the concept "throw out all of the old and defective" for the dictum "to do good and to do no harm."

For these reasons, medicine is compelled to oppose retirement keyed to any chronological age, as detrimental to the best interests of the employee. To do otherwise would be to lose all to those who would gradually lower the age of these so-called retirement criteria

until they would be applied at birth. The gnarled, the runty, the defective, like the gnarled, runty apples and oranges, would be graded out in the beginning. This approach might make medicine of the future more simple, but it would certainly separate the "art" of medicine from the "science."

It is true that persons who have maintained broad interests throughout life and are financially secure could quite conceivably enjoy and benefit from the years following retirement. Insofar as these individuals continue to give of their abilities to others—insofar as their life still has a purpose other than self-gratification—they cannot be called "retired" in any real sense. They have re-directed rather than relinquished their channels for contribution.

The majority of persons, unfortunately, do not fall in this category. Compulsory retirement on the basis of age will impair the health of many individuals whose job represents a major source of status, creative satisfaction, social relationships or self-respect. It will be equally disastrous for the individual who works only because he has to, and who has a minimum of meaningful goals or interests in life, job-related or otherwise. Job separation may well deprive such a person of his only source of identification, and leave him foundering in a motivational vacuum with no frame of reference whatsoever.

There is ample clinical evidence that physical and emotional problems can be precipitated or exacerbated by denial of employment opportunities. Few physicians deny that a direct relationship exists between enforced idleness and poor health. The practitioner with a patient load comprised largely of older persons is convinced

that the physical and emotional ailments of many of these patients are a result of inactivity imposed by denial of work. Physicians generally agree that chronic complaints develop more frequently when a person is inactive and without basic interests. It is easy for the unemployed, unoccupied person to over-concern himself with his own normal physiological functions, and to exaggerate minor physical or emotional symptoms.

The physical and mental health of an individual can be affected by loss of status, lack of meaningful activity, fear of becoming dependent, and by isolation.

Compulsory retirement produces a chain reaction in the health of such persons. It is a fact that the working man finds it difficult to accept the feeling of no longer being needed on the job. He loses contact with his work associates—many of whom may have been his closest friends—and is thrown back on the family.

Here, having a lesser part to play, he may experience loss of dignity and status. This is particularly so if his contributions to the family social circle previously have revolved solely or primarily around a recounting of his job experiences. The individual who has developed virtually no interests outside of those connected with his paycheck, who does not keep up with community affairs or dress up as he did when working, who can offer little to the family circle except his presence underfoot for 24 hours a day, may soon find himself isolated from the family itself. While isolation, per se, does not cause illness, it increases the chances of physical or emotional disturbance. It may also activate underlying neuroses, contribute to obesity and alcoholism and even precipitate an underlying tendency to suicide.

Vital Statistics of the United States and other sources report that suicides reach a peak in upper age brackets —after retirement normally occurs. The highest incidence of suicide for white males occurs in the age group 70 years and over; for non-white males in the age group 60 and over. There is also a tendency for the person who commits suicide to do so after being isolated from society.

There may also be direct physical sequelae to the abrupt change in activity patterns. The nice nutritional adjustment to work which many individuals develop may be set awry on retirement. The person whose physical and mental exercise has been solely or primarily connected with earning a living may exhibit a progressive disuse atrophy following job separation.

Whatever may be the precise percentage adversely affected by retirement, and physicians are convinced it is high, it is ill-advised to create additional problems for people by arbitrarily denying them one of mankind's principal avenues for self-satisfaction. For these reasons, the Committee on Aging decries the practice of retirement by the calendar without regard to individual capabilities or motivation.

B. Suggested Approach

It is the conviction of the Committee that any decision for or against retirement should rest on the same three fundamentals as does a decision for or against hiring:

(1) the individual's desire to work;

(2) the individual's ability to work; and

(3) the employer's need for the skill or ability which the individual offers—or is potentially able to offer.

These fundamental criteria would be applied at the time of employment, would operate over the employee's entire work life with the firm, and could form the basis for a decision *at any time during this work life* for or against job reassignment, job retraining or job separation—whether in the form of retirement or dismissal.

Many of the reservations expressed about such individualized placement and retirement programs revolve around the second criterion listed above—the individual's ability to continue work—and around the development of methods by which to accurately measure this ability. Accordingly, this paper will attempt to (a) list some of the specific physical and mental characteristics which might be measured in assessing capability for continued work, and (b) suggest a general system for applying such measurements.

It should be re-emphasized that these measurements are not designed to be held "in abeyance" until a certain chronological age, and then applied periodically thereafter, but to be utilized at regular intervals throughout the employee's work life. As such, they may well assist in identifying the individual who should be replaced at 50 as well as one still capable at 90. The individual's physical and emotional status would dictate the frequency of such evaluations, and their results would of course be confidential between employee, employer and physician.

If such an individualized retirement system is to function with optimum effectiveness and benefit to both employee and employer, the firm involved will need to think in terms of hiring and utilizing an employee for his entire work life *potential* rather than just to fill

a particular position or slot currently open in the organization. The firm will need to evaluate—and re-evaluate—an employee's capabilities not only for the position currently being filled, but for positions which may become available in the future. Such a personnel policy will be *employee- rather than job-centered,* and will entail greater attention to job analysis, employee training and re-training, and counseling programs within the firm.

Periodic evaluation of the employee's capabilities over his entire work life will be important in providing a base line from which to evaluate physical and mental capabilities at any time he is considered for retirement or job reassignment. Continuous employee counseling, too, will be an integral part of such a system, for a number of reasons. Counseling will be needed because a fluid rather than fixed separation date might otherwise find the worker unprepared emotionally, socially or financially. Individual interpretation may be needed to appropriately prepare the worker when retirement seems desirable. In cases where retirement is indicated, such counseling might delineate the other factors in addition to the individual's capabilities which would influence the decision for or against retirement, and thus help avoid his taking dismissal as a "failure to measure up." On the other hand, counseling may be needed in some instances to persuade an employee to *continue* working, when his own and the company's interests so indicate. Finally, counseling will be important in those cases where continued employment involves an adjustment in work status, pay and prestige for the employee. This may occur because of a decline in the employee's capabilities, or because of a decline in need for the employee's capabilities.

There is no attempt here to imply that the employer owes a greater responsibility to older workers than he does to those in any other age group. It would obviously be unrealistic, for example, to urge an employer to retain an older worker—no matter how highly proficient—if there were no further possible way of utilizing that worker's contribution or potential contribution. It is assumed, however, that employment and retirement practices would be based on conservation and fullest possible utilization of existing manpower—by selecting, placing, promoting and retraining employees on the basis of qualifications for the job. It is assumed also that employee training, re-training and counseling programs will assist the firm in achieving this objective.

Further, under the type of continuous program proposed in this report, the employee no longer needed in one firm may well secure quick employment in another, on the strength of the data developed on his capabilities and potentials over the years.

C. Medical Evaluation

Basically, evaluation of an individual's capability for a particular job, whether his present position or an alternative available opening, would consist of matching an "Employee Profile" of those physical and mental capabilities susceptible to change over his work life, with a "Job Profile" of the same physical and mental requirements, using identical gradations for comparability. The following section lists some of the specific criteria which might be included in the Employee and the Job Profiles. *It should be emphasized that this list of criteria is not all-inclusive or exclusive; nor are the gradations specified necessarily the most meaningful.*

*The material is intended only to be suggestive of an over-all system for making such evaluations.**

1) Physical Criteria
   - Strength and endurance .....(S)
   - Mobility—range of motion .....(M)
   - Dexterity .....(D)
   - Coordination .....(C)
   - Vision .....(V)
   - Hearing .....(H)
   - Equilibrium .....(E)

The first four characteristics might be evaluated separately for:

- Forearm and hand .....(F)
- Upper extremities—upper arm, shoulder girdle and back .....(U)
- Lower extremities—feet, legs pelvic girdle and lower back .....(L)

2) Mental Criteria
   - Concentration .....(C)
   - Analytical ability .....(A)
   - Judgment .....(J)
   - Flexibility .....(F)
   - Initiative .....(I)
   - Ability to work effectively with others .....(P)

A numerical gradation or scale could then be established for each of the above criteria. For example, under (S)—Strength and endurance—a scale of 1 through 4 might be established as follows:

1—Able to perform maximum sustained effort over long periods

*Adapted from the U.S. Army Physical Profile Serial system, (PULHES), used to assess the functional ability of individuals to perform military duties.

2—Able to perform sustained effort over long periods

3—Able to perform sustained effort over moderate periods

4—Unable to perform sustained effort

Similar gradations would be established for other criteria.

Using this system, a "Job Profile" would be established for each position under consideration, and would be reviewed periodically in the light of changing requirements within the firm. Thus, a hypothetical Job Profile of requirements for the position of tool and die maker might look somewhat as follows:

Physical

S (Strength and endurance) .....
(F-2) (U-2) (L-3)

M (Mobility—range of motion) .....
(F-1) (U-1) (L-2)

D (Dexterity) .....
(F-1) (U-1) (L-3)

C (Coordination) .....
(F-1) (U-1) (L-3)

V (Vision) 1

H (Hearing) 3

E (Equilibrium) 1

Mental

C (Concentration) 1

A (Analytical ability) 1

J (Judgment) 3

F (Flexibility) 2

I (Initiative) 3

P (Ability to work effectively with others) 3

A comparable Employee Profile would then be developed and updated periodically thereafter for the individual, through an evaluation of his physical and mental capabilities by his own and the plant physician, combined with a rating by his supervisor and the personnel department on certain aspects of the Profile. Many of the Employee Profile capabilities—mobility, strength and endurance, for example—will require and be directly susceptible to objective medical evaluation; others such as analytical ability, judgment, ability to work effectively with others, etc., may be more amenable to rating by the supervisor or personnel department, or to measurement by testing procedures. The methods for measuring various facets of the Employee Profile will need to be worked out in detail, utilizing accepted testing and evaluation procedures as far as possible. The methods developed should be generally standardized and accepted between different employers, to permit comparability of results.

Of particular importance in periodic evaluation of the more "intangible" capabilities such as flexibility, judgment, and the like will be a concurrent assessment of employee *motivation*, in order to distinguish between decline in these capabilities, and a decline in *desire to use* these capabilities. This is more than an academic distinction, since it may make the difference between retirement—for cause outside the employee's control—and separation—for cause within the employee's control.

To offset normal variations in employee performance from one day to the next, as well as the fluctuation resulting from increased motivation at the time of testing, it would probably be advisable to evaluate some of

the employee characteristics over a period of time, rather than at a particular point in time. A periodic comparison of Job and Employee Profiles would then provide some quantitative frame of reference from which to consider the individual's suitability for continued employment.

No attempt is made in this report to suggest a minimum rating level below which the employee would be disqualified for continued employment. It would be fallacious to presume that simple comparison of Employee Profile with Job Profile will provide a cut-and-dried answer in itself; additional factors will influence the decision as to what constitutes an acceptable "score" on the Employee-versus-Job Profile.

The physician, in making a recommendation for or against continued employment on the basis of health, will have to consider not only the individual's present physical capabilities for the job in question, but also the presence of currently non-disabling physical or mental disorders which might be exacerbated by job demands. Other factors needing consideration include the individual's potential for training or re-training in alternative job skills, the importance of work as a source of status for the individual, and the extent to which mental health will be fostered by continued employment.

The employer will want to consider not only the physician's recommendation, the demand for skills of the employee under consideration, the firm's investment in the employee, and his current and predicted job performance, but also his potential value to the firm in future years, in terms of new products or services to be developed.

In the final analysis, it is the Committee's conviction that the decision for or against retirement, just as the decision for or against hiring, should be an individual one, in terms of a specific employee, in a specific firm, at a specific time.